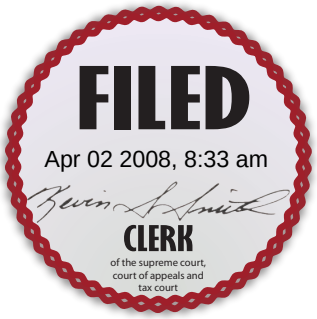

ATTORNEY FOR APPELLANT:

GEORGE A. LEININGER
Collins Hensley & Wynn
Madison, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H.MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BRIAN E. KEMP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 39A01-0708-CR-389
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-0703-MR-48

April 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Brian Kemp appeals his convictions and sentence for murder and Class A felony conspiracy to commit murder. We affirm.

Issues

The issues before us are:

I. whether the trial court properly allowed statements Kemp made to police into evidence; and

II. whether his aggregate sixty-five year sentence is appropriate.

Facts

The evidence most favorable to the convictions is that in January 2007, Kemp was living in Jefferson County with his fiancée, Carissa Miller, and Brandon Skinner. Skinner's ex-wife, Donielle Sherley, was living elsewhere with her fiancé, Michael Bowling, and Ashley Robinson. Skinner and Sherley had a two-year old daughter, J.S.

On January 7, 2007, Kemp, Miller, Skinner, Sherley, Bowling, and J.S. were all at Kemp's house. At some point, J.S. allegedly said that Robinson had touched her "in the wrong place." Tr. p. 921. This angered Skinner, who said that he wanted to kill Robinson and "[t]hat bitch needs to pay or justice won't be served." Id. at 1013. Kemp agreed with Skinner that Robinson needed to be killed.

Kemp, Miller, Skinner, Sherley, and Bowling agreed on a plan to kill Robinson. Kemp provided Skinner with a shotgun and shotgun shells, and showed Skinner how to assemble the gun. Sherley and Miller agreed to lure Robinson to Saluda Bottoms along the Ohio River on the pretext of having a "girl's night out" to smoke marijuana. Id. at

928. Kemp, Miller, and Bowling drove separately to Saluda Bottoms and waited for the women to arrive there.

When everyone arrived, Kemp, Skinner, and Robinson walked down to the river while Miller, Sherley, and Bowling stayed with the vehicles. Skinner then said he had forgotten his "weed," and went back to his truck. Id. at 1177. Bowling gave Skinner the shotgun, and Bowling, Sherley, and Miller drove away. Robinson was showing Kemp pictures of her child on her cell phone when Skinner approached and shot Robinson in the face. Kemp and Skinner were not sure whether Robinson was dead, so Kemp gave Skinner another shotgun shell and Skinner shot Robinson in the face a second time. Skinner dumped Robinson's body in the river while Kemp took the shotgun back to the truck.

Kemp disposed of Skinner's bloody clothes by placing them in a barrel of acid that Kemp had access to at his job. The day after the shooting, Kemp and Skinner drove back to the murder site to make sure Robinson's body was not visible. It was not, but her shoes were, and Kemp threw them into the river. Kemp, Skinner, Miller, Sherley, and Bowling agreed to lie to police if they were questioned about Robinson's disappearance. Kemp hid the shotgun, first in his house, and later in a shed at his mother's house.

Robinson's mother filed a missing person report on February 5, 2007. Police questioned Kemp and the others at that time, and they denied any knowledge of what might have happened to Robinson. On March 14, 2007, police decided to re-interview Kemp and the others. Indiana State Police officers Detective Peter Tressler and Trooper Adam Bullock went to Kemp's place of work and asked to speak with him. Detective

Tressler, Trooper Bullock, and Kemp went to a conference room, and Detective Tressler began questioning Kemp about Robinson's disappearance. After about fifteen or twenty minutes of questioning, Kemp began crying and said that Robinson was dead. Kemp became "extremely cooperative" at that point. Id. at 807. He told Detective Tressler and Trooper Bullock what had happened, directed the officers to the murder scene, and told them where the shotgun was and about placing Skinner's clothes in a barrel of acid. Conservation officers later discovered a body near the Ohio River that was identified as Robinson.

On March 19, 2007, the State charged Kemp with murder and Class A felony conspiracy to commit murder. On March 30, 2007, Kemp filed a motion to suppress his statements given to police on March 14 because he had not been Mirandized prior to making them. After conducting a hearing, the trial court denied the motion to suppress on May 30, 2007. Kemp's jury trial began on June 6, 2007, and he was convicted as charged. He was sentenced to sixty-five years for the murder conviction and fifty years for the conspiracy conviction, to run concurrently. Kemp now appeals.

Analysis

I. Admission of Evidence

Kemp challenges the denial of his motion to suppress his statements to police on March 14, 2007. Because Kemp proceeded to trial and the statements were admitted at trial, the question is whether the trial court properly admitted that evidence and the denial of his motion to suppress is not a viable issue. Kelley v. State, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). We will reverse a trial court's ruling on the admissibility of evidence

only for an abuse of discretion. Id. An abuse of discretion occurs if a decision is clearly against the logic and effect of the facts and circumstances before the court. Id. Where a pretrial suppression hearing was held, courts may reflect upon the foundational evidence from that hearing if it is not in direct conflict with the evidence introduced at trial. Id. at 426. Additionally, we should consider evidence from the motion to suppress hearing that is favorable to the defendant and has not been countered or contradicted by foundational evidence offered at the trial. Id.

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). "Custodial interrogation" is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. Id., 86 S. Ct. at 1612. Prior to any custodial interrogation, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id., 86 S. Ct. at 1612. "Statements elicited in violation of Miranda generally are inadmissible in a criminal trial." Morris v. State, 871 N.E.2d 1011, 1016 (Ind. Ct. App. 2007), trans. denied.

Detective Tressler's conversation with Kemp on March 14, 2007, clearly constituted "interrogation." The dispositive issue is whether Kemp was "in custody" at that time. The defendant need not be placed under formal arrest to be in custody. Id.

"Rather, a person is in custody if a reasonable person under the same circumstances would have believed that he or she was under arrest or not free to resist the entreaties of the police." Id. A custody determination requires examination of all the objective circumstances surrounding the interrogation. Id. An officer's knowledge and beliefs regarding custody are relevant only if they are conveyed—through words or actions—to the person being questioned. Id. Courts must consider how a reasonable person in the suspect's shoes would have understood the situation. Id. "Also relevant is the length of the detention and questioning." Id. Miranda warnings apply only to persons in custody because they are meant to overcome the inherently coercive and police dominated atmosphere of custodial interrogation. Collins v. State, 873 N.E.2d 149, 155 (Ind. Ct. App. 2007), trans. denied. The mere fact that an interrogation takes place in an arguably coercive atmosphere after police investigation has focused on the defendant does not by itself mean that the defendant is in custody. Luna v. State, 788 N.E.2d 832, 833-34 (Ind. 2003) (overruling Dickerson v. State, 257 Ind. 562, 276 N.E.2d 845 (1972)).

The following is what occurred from the time Detective Tressler began questioning Kemp at approximately 10:30 a.m. on March 14, 2007, until Kemp was advised of and waived his Miranda rights at 11:55 a.m. Detective Tressler and Trooper Bullock arrived at Kemp's place of work in an unmarked car, and neither was in uniform. Detective Tressler was not carrying either a firearm or handcuffs. After Kemp's supervisor found him, Detective Tressler asked if they could talk about Robinson and Kemp said, "sure." Tr. p. 12. The supervisor then found an empty conference room

where Kemp, Detective Tressler, and Trooper Bullock could talk, and the door was closed.

After fifteen to twenty minutes of discussion, during which at one point Detective Tressler raised his voice and pounded on the table, Kemp said, "she's dead." Id. at 19. Kemp then described the plan to kill Robinson and the fact that the shotgun Skinner used was his. Kemp also volunteered to take police to the murder scene at Saluda Bottoms. At one point during the interrogation, Trooper Bullock left the conference room and building and drove away. Also, at one point, after Trooper Bullock had left, Detective Tressler left the conference room to speak with Kemp's supervisor about him having missed work around the time of the murder, and the door to the room was left open. When Detective Tressler indicated that he was ready to go to Saluda Bottoms, he allowed Kemp to go to his locker at work, unaccompanied, for about five minutes to put away his safety goggles and to retrieve some items. After leaving the building, Kemp also went to his car to retrieve some additional items. Detective Tressler and Kemp had to wait several minutes for Trooper Bullock to return with the car. The three then went to the Madison National Guard Armory, where Detective Tressler wanted to speak with the lead investigator. There was no discussion of the case during the drive to the Armory. Kemp exited the vehicle and smoked a cigarette, while Detective Tressler and Trooper Bullock walked about trying to establish good reception for their cell phones. At no time was Kemp placed in handcuffs. Before continuing on to Saluda Bottoms, Detective Tressler read Kemp his Miranda rights, Kemp waived them, and Detective Tressler then began recording a statement by Kemp while Trooper Bullock drove.

We cannot say Kemp was in custody at any time prior to his being advised of his Miranda rights. The interrogation took place in a conference room at Kemp's place of work, not a police station. The questioning officer was not in uniform and was unarmed. Kemp's physical liberty was never restrained in any way, by handcuffs or otherwise. Kemp was left completely alone, with no police presence, on at least two occasions while in a building that had numerous exits. The entire length of time between the beginning of questioning and the advisement of Miranda rights was approximately one and a half hours, with Kemp's confession coming within the first twenty minutes of that time. There was no prolonged, extensive questioning, nor the use of deceptive or overbearing tactics, despite Detective Tressler's apparently becoming agitated at one point during the interview. The record establishes that Kemp was entirely cooperative with police and volunteered his assistance because of his regret for Robinson's death. This was not a situation in which Kemp was placed in an "inherently coercive and police dominated atmosphere" that is indicative of custodial interrogation. See Collins, 873 N.E.2d at 155. Kemp was not required to have been advised of his Miranda rights at the time he first confessed to police. The trial court properly denied his motion to suppress and admitted those statements into evidence.[1]

[1] Because we hold Kemp was not in custody when he gave his first, unrecorded confession to police, we need not address whether Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601 (2004), applies to his second, recorded, post-Miranda confession. "Seibert disapproved of 'question first-warn later' interrogation techniques whereby a person in custody is interrogated without Miranda warnings, the person confesses, and the police only then Mirandize the person and record the confession." Morris, 871 N.E.2d at 1019.

II. Sentence

Kemp also challenges the aggregate sixty-five year sentence he received for murder and Class A felony conspiracy to commit murder. We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Although Kemp references the abuse of discretion standard of review in his brief, he does not specifically challenge the adequacy of the trial court's sentencing statement or its findings of aggravators and mitigators. Instead, his argument focuses upon the nature of the offense and his character as justifying a reduced sentence, which is a Rule 7(B) argument. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and

recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

We first note that Kemp claims he received a maximum sentence. It is true that he received the maximum possible sentence for murder (not including the death penalty or life without parole) and Class A felony conspiracy to commit murder, sixty-five and fifty years respectively. See Ind. Code §§ 35-50-2-3(a) and 35-50-2-4. However, the trial court ordered those sentences to run concurrently. Kemp makes no argument that the trial court was required to order those sentences to run concurrently, rather than consecutively, because of double jeopardy or similar concerns. Sentences for murder and conspiracy to commit that same murder may run consecutively under appropriate circumstances. See Jack v. State, 870 N.E.2d 444, 449 (Ind. Ct. App. 2007) (affirming sentence of sixty years for murder and forty years for conspiracy to commit murder running consecutively for total sentence of 100 years), trans. denied. It is more accurate to say that the maximum total sentence Kemp faced in this case was 115 years, or sixty-five plus fifty.

Regarding the nature of the offense, it is true that Kemp was not the actual triggerman. However, Kemp provided the shotgun and ammunition to Skinner with full knowledge of his intention to kill Robinson. Kemp's claim in his brief that he did not think Skinner would actually shoot Robinson is his theory of the case that the jury clearly rejected; there was ample evidence presented that Kemp was a fully participating member in the conspiracy to kill Robinson. Kemp also took a proactive role in attempting to

conceal evidence of the crime, including the hiding of the shotgun, the placing of Skinner's clothes in a barrel of acid, and returning to the murder scene the day after and making sure neither Robinson nor anything belonging to her was visible. Additionally, although Kemp did eventually cooperate with police, he did not do so when first questioned by police about the case in February 2007, per an agreement between him, Skinner, Miller, Sherley, and Bowling. The amount of planning beforehand and cover-up afterwards makes this crime worse than an "ordinary," spur of the moment killing.

Also increasing the depravity of this crime is that Robinson was pregnant when she was killed. It is not clear from the record whether Kemp knew this, and it appears Robinson was in the early stages of her pregnancy.[2] Still, "pregnancy is similar to the infirmity or age of the victim in that the defendant's knowledge of these circumstances is not necessary for them to qualify as aggravating." McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001). Overall, we find the nature of the offense here to be very heinous.

Regarding Kemp's character, it does appear that before the events of this case he was a working, productive member of society. We also acknowledge that he does not have a criminal history that should be considered significantly aggravating when considering a sentence for murder and conspiracy to commit murder. He has one prior conviction for Class D felony operating while intoxicated ("OWI"). A criminal history comprised of a single, nonviolent misdemeanor OWI offense is not a significant aggravator in the context of a sentence for murder. Wooley v. State, 716 N.E.2d 919, 929

[2] The baby apparently was due to be born around the time of Kemp's sentencing, mid-July 2007, or approximately six months after Robinson was murdered.

(Ind. 1999). It is unclear why Kemp's OWI conviction was a felony, rather than a misdemeanor,[3] but in any event this single non-violent conviction should not be considered aggravating in the context of murder and conspiracy to commit murder. On the other hand, this conviction, along with Kemp's admitted use of illegal drugs, does demonstrate that his character is not faultless.

The trial court also found that Kemp expressed remorse for Robinson's death, and we credit that finding. See Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) ("Remorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility."). However, also as noted by the trial court, Kemp waited two months to divulge to police what he knew about Robinson's disappearance; before that time, he had actively concealed Robinson's murder. In short, although Kemp's character is far from what may be characterized as the "worst," neither is it perfect.

Given the heinousness of Robinson's murder, particularly the planning surrounding it and the cover-up afterwards and the fact of Robinson's pregnancy, we conclude that imposition of the maximum sentences for murder and Class A felony conspiracy to commit murder is warranted. Maximum sentences for murder and conspiracy to commit murder, with those sentences running concurrently, is appropriate.

---

[3] OWI may be a Class D felony based on having a prior OWI conviction within the previous five years, but there is no indication Kemp has another OWI conviction. See I.C. § 9-30-5-3(1). It also may be a Class D felony if the defendant caused serious bodily injury. See I.C. § 9-30-5-4(a). The final possibility for Class D felony OWI is if a person over twenty-one years old drives while intoxicated with a passenger under eighteen years old. See I.C. § 9-30-5-3(2).

Conclusion

The trial court did not abuse its discretion in admitting Kemp's statements to police into evidence. His aggregate sixty-five year sentence is appropriate. We affirm Kemp's conviction and sentence.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.